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No. 89-704

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF

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Respondent State of Connecticut,[1] in its opposing brief in No. 89-704: (1) questions jurisdiction based on the irregular filing of a "jurisdictional statement" by counsel for Petitioner[2]

[1,2] We refer here to the filings in this case in all instances as if the initial filing had been such a Petition ("Pet.") and not an attempted Jurisdictional Statement. The Clerk's office of this Court advised by letter and instructed Respondent's counsel that the filing was docketed and would be treated

(continued)

instead of a proper Petition for Writ of Certiorari under 28 U.S.C. §1257(a) following the 1988 amendment (Brief in Opposition, p. 1); (2) claims that this Court's decision in *Will v. Michigan Dep't of State Police*, 491 U.S. ____, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989), renders Petitioner's Question Presented irrelevant (Resp. Br. Opp., p. 8); and (3) claims that Petitioner's challenge to the decision below (as to claims against the State of Connecticut for money damages for civil rights deprivations committed by State officers or employees under Connecticut's legislative framework for *Claims against the State*) neither raises any significant issue of federal law nor shows a conflict with a pertinent state or federal decision (Resp. Br. Opp., pp. 4–7).

The texts of 42 U.S.C. §§1983 and 1988 are set forth in footnotes 2 and 4 in the opinion of the Connecticut Supreme Court below, *Krozser v. New Haven*, 215 Conn. 415, 416–417, 562 A.2d 1080 (1989), printed at pages 2A and 3A of the Appendix to the Petition.

1. **Jurisdictional allegations.** Petitioner's counsel plainly but mistakenly sought review in this Court by appeal, alleging the pre-amendment provisions of 28 U.S.C. §1257(2) as the jurisdictional basis (Pet., p. 2), instead of by petition for writ of certiorari as proper under 28 U.S.C. §1257(a) following its amendment in 1988. Respondent acknowledges that it "has been instructed by the Clerk's office that the Jurisdictional

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[1,2] *(continued)*
as a Petition for Writ of Certiorari. The Appendix to the initial filing is referred to as the Appendix to the Petition ("Pet. App."), the opposing brief as Respondent's Brief in Opposition ("Resp. Br. Opp."), and the parties as Petitioner and Respondent. Notice that this case proceeds as a Petition for Writ of Certiorari rather than an Appeal has been provided to the Connecticut Supreme Court and to its Clerk's Office by filing with that Court a copy of the letter from the Clerk of this Court advising of the docketing of the "jurisdictional statement" as a Petition for Writ of Certiorari, a copy of this Reply, and a letter to the Connecticut Supreme Court Clerk advising of these particulars.

Statement filed in this case will be treated as though it were a Petition for Writ of Certiorari." (Resp. Br. Opp., p. 1).

Under 28 U.S.C. §1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Where, as here, such mistaken allegation is plain and causes no prejudice, the Petition's allegation of jurisdiction should be deemed to have been amended so that the last two sentences on page 2 of the Petition state:

> This petition for writ of certiorari is being docketed within 90 days from the entry of such judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

and, similarly, the conclusion or prayer at the close of the Petition (Pet., p. 16) should be deemed to have been amended to state:

> For these reasons, this Court should grant certiorari.

in order to achieve the "statutory purpose of avoiding needless sacrifice to defective pleading . . . ." *Mathews v. Diaz*, 426 U.S. 67, 75 n.9 (1976).

Alternatively, Petitioner so amends his Petition under 28 U.S.C. §1653 upon such terms as this Court provides.

2. ***Will v. Michigan Dep't of State Police*** **and 42 U.S.C. §1988.** This Court's decision June 15, 1989, while this case was *sub judice* before the Connecticut Supreme Court, in *Will v. Michigan Dep't of State Police*, 491 U.S. ____, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989), that a State is not a "person" within the 1871-defined ambit of 42 U.S.C. §1983, is not pertinent here.

The opinion below, of which review is sought, refers to that issue in footnote 5 and cites the *Will* result (Pet. App., pp. 3A–4A), but explicitly states there, ". . . [W]e did not address that issue." 212 Conn., at 417–418 n.5. The decision below rests squarely on the Connecticut Supreme Court's determination that, where sovereign immunity is relaxed by the State's constitution and statutes, the State may nevertheless condition access to the State's courts for a claim for money damages for a federal civil rights deprivation under §1983 upon successful completion of a prior administrative proceeding. This portion of the Connecticut Supreme Court's opinion is quoted in the paragraph beginning at the foot of page 8 of the Petition, and the validity of such condition is the only issue of which review is sought by the Question Presented (Pet., p. i).

Where, as here, there is a summary dismissal upon a threshold issue, related issues not actually in question but appropriate for subsequent development in any further proceedings may be drawn upon by Respondent to cloud the foreground as well as the horizon. See, for example, *Erwin v. Westfall*, 484 U.S. 292, 299–300 (1988). For clarity, we address two of these briefly here to show in advance that their proper subsequent consideration will also support the grant of certiorari by enhancing rather than diminishing the significance of the issue directly involved as well as the significance of the case upon full development.

Petitioner contends that the State of Connecticut is the proper defendant in a civil rights action for money damages in a Connecticut state court *not* by operation of 42 U.S.C. §1983 but rather by the joint operation of 42 U.S.C. §1988 and the provisions of chapter 53 of the Connecticut General Statutes (§§4-160, 4-165, Conn. Gen. Stat., quoted at Pet., p. 4) which empower the Connecticut Claims Commissioner to authorize suit against the State when the Commissioner "deems it just and equitable . . . on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable[;]" which immunize state officers and employees from personal liability ". . . for damage or injury,

not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment[;]" and which require that, "Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter."

Under *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978), the "ultimate rule adopted under §1988 ' "is a federal rule responsive to the need whenever a federal right is impaired." ' " (Citations omitted.) There, a Louisiana survivorship statute which allowed only a spouse, child, parent, or sibling, 436 U.S., at 591, to serve as a substituted plaintiff to permit the survival of a civil rights action upon the death of the "person" who actually suffered the rights deprivation, was upheld because, although somewhat limited in its provision for survivorship, it was evenhanded as between federal civil rights claims and other claims. Implicitly, and in the practice in this field since 1978, that decision upheld the principle that State supplementary remedies not within the 1871-defined ambit of 42 U.S.C. §1983 as to survivorship could be "adopted" or imported into the §1983 practice if not "inconsistent with the Constitution and laws of the United States." 436 U.S., at 590. Thus, designated survivors as substituted party plaintiffs not recognized in 1871, and the survival of claims which would have abated on death of the claimant in 1871, both established by state statute after 1871, are adopted into the §1983 practice by operation of the provisions of §1988 for expansion of remedies in accordance with local law. Analogously, in Connecticut, although the State was not a §1983 "party" under *Will* as of 1871, and was not subject to any §1983 claim as of 1871 by virtue of sovereign immunity, the enactment of chapter 53 of its statutes, "*Claims against the State*," under the provisions of §1988 for expansion of remedies, makes the State the proper defendant and establishes the cognizability of the §1983 claim against the State which did not exist as of 1871.

Whatever the actual and practical content of the test for the authorization of suit against the state as provided by

statute to be applied by Connecticut's Claims Commissioner, and it might be "consistent with the Constitution and laws of the United States" to examine questions of absolute or qualified immunity under cases such as *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), it is clearly inconsistent with and "directly contrary to the several principles enunciated in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123, 144, 108 S.Ct. 2302, 2312 (1988), reiterating the statements in *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984)," (Pet., p. 13), to require that test to be applied first in an administrative proceeding before access to a state court *may* be achieved for a §1983 claim for money damages in Connecticut.

The validity of such a precondition is the subject of this Petition. That the State is a proper defendant by operation of §1988 together with the state remedial statutes, and that there can be no additional limits on waiver of immunity that a Connecticut Claims Commissioner can apply beyond what can be applied in a court proceeding (because such would be "inconsistent with the Constitution and laws of the United States"), are issues for further proceedings in Connecticut courts should this case be remanded.

3. Conflicts with other decisions and significance of issue. Respondent incorrectly states that the Petition shows no conflict between the decision below and the decisions of this Court. See, Petition, at pages 13 to 14, a portion of which is quoted on this page above. As to the decisions of state courts of last resort, *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989), indicates a proper application of the principles of *Felder* and that the Iowa Supreme Court would likely have reached the opposite result had the precise circumstances of this case been before it, but a precise conflict would require the extremely unlikely circumstance of a precise parallel between the Connecticut statute and that of the other state.

The significance of the federal issue here is indicated by this Court's grant of certiorari in No. 89-5383, *Howlett v. Rose*, which also involves the issue of limitations upon access to state courts for federal civil rights claims where the state has statutorily relaxed the strictures of sovereign immunity. Certiorari was granted in *Howlett* November 13, 1989, after the filing of the instant petition, and Petitioner has filed a separate motion to defer consideration of this petition until a time after the decision in *Howlett* as that decision will likely permit a summary disposition of this case.

4. Conclusion. For the foregoing reasons, if this Court does not grant the motion in the instant case for deferred consideration, it should grant certiorari.

Respectfully submitted,

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January 2, 1990